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October 15, 1998

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket 98-141

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and twelve (12) copies of Comments of Focal Communications Corporation In Opposition to Application For Transfer of Control.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the envelope provided. If you have any questions regarding this filing please contact me at 202/424-7791.

Sincerely,



Robert V. Zener

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
Applications for Consent)
to the Transfer of Control of Licenses)
Section 214 Authorizations from)
AMERITECH CORPORATION,)
Transferor)
to)
SBC COMMUNICATIONS INC.,)
Transferee)

CC Docket 98-141

OCT 15 1998

**COMMENTS OF FOCAL COMMUNICATIONS CORPORATION
IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL**

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October 15, 1998

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EXECUTIVE SUMMARY

1. There is no doubt that SBC's management will dominate the merged company. SBC's management has a history in Texas, and in California following its takeover of PacTel, of stonewalling market-opening measures. The merger will be anticompetitive because it will extend the stonewall corporate philosophy to Ameritech's region.

2. SBC claims the merger will benefit the public by bringing significant competition for the first time to the local exchange market. A similar claim is now being made on behalf of the Bell Atlantic/GTE merger. It is claimed that each of these giant companies will compete in each other's home region as well as in the home regions of the other incumbent ILECs, and consumers will benefit.

This is a dubious scenario. When two firms dominate a market, they are not likely to attack each other's market share, out of fear that the other will retaliate and in the ensuing battle neither side will gain sufficiently to offset the risk and expense of the fight. SBC-Ameritech and Bell Atlantic-GTE might compete with each other for the local exchange business of large business customers – because that is a market segment where other firms are beginning to provide significant competition. Indeed SBC concedes that the principal focus of its plan on such customers, precisely because it fears other carriers might take this profitable business. But that would only bring additional competition to a market segment where other carriers have already begun to compete.

In market segments where there is yet no significant competition from other carriers – i.e., in the market for residential customers and small and medium-sized businesses – it is most unlikely that the two merged giants will compete with each other, because to do so would trigger retaliation and an expensive fight that neither would win.

3. SBC and Ameritech are already huge companies, with sufficient financial and managerial resources to compete in the local markets out-of-region. Indeed, Ameritech has already made one serious competitive foray into the St. Louis market, where it has significant brand-name recognition and a large customer base. The merger will have the anticompetitive effect of eliminating competition between SBC and Ameritech in the St. Louis market.

4. Other potential competitive forays by Ameritech into California and Texas need to be more fully explored, both through inspection of Hart-Scott-Rodino documents, and a hearing. Analysis of intra-corporate motives is an issue that cannot be adequately resolved merely by an exchange of written comments.

5. Approval of the merger with conditions would not be effective to alleviate its anticompetitive effects. Once the merger is approved, effective enforcement of the conditions would be extraordinarily difficult. In the event, however, that the merger is approved, stringent market-opening conditions are essential, with effective penalties for non-compliance.

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**COMMENTS OF FOCAL COMMUNICATIONS CORPORATION
IN OPPOSITION TO APPLICATION FOR TRANSFER OF CONTROL**

Focal Communications Corporation ("Focal") is a competitive local exchange carrier. It is authorized to provide resold and facilities-based local exchange service in California, Delaware, the District of Columbia, Florida, Illinois (in the Chicago LATA), Indiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Virginia. Focal's affiliates have negotiated interconnection agreements with Bell Atlantic in New York, Delaware, New Jersey, and Pennsylvania; with Pacific Bell and GTE in California; and with Ameritech in Illinois and Indiana.

DISCUSSION

If the trend represented by this merger continues, the country will shortly have a local telephone market dominated by only two or three Bell behemoths. Indeed, if this merger and the Bell Atlantic/GTE merger are approved, the two combined companies will control together over two-thirds of the access lines in this country, a degree of concentration not seen since before the

break-up of the old AT&T.¹ Before allowing this trend to go any further, the Commission must carefully weigh its anticompetitive effects and must be convinced that there are public benefits outweighing such effects.

The merger will cause anticompetitive effects not only by dramatically increasing the concentration of control over local access lines, but also by bringing to Ameritech's region SBC's management philosophy of "stonewalling" attempts to introduce local competition. The claimed public benefit of the merger – i.e., that it will enable SBC and Ameritech to compete in local markets outside their region--is not plausible, because these companies already have the resources to compete in local markets outside their region. Indeed, Ameritech was competing with SBC in St. Louis before the merger was announced; one anticompetitive effect of the merger would be to eliminate such competition. Moreover, if the local market is reduced to two or three Bell behemoths, it is unlikely that they will seriously seek to compete with each other anywhere (unless other companies force them to do so). The Bell companies are much more likely to compete with each other if they are first told that the merger wave has gone far enough, and that further expansion must come through competition, not acquisition.

¹ SBC has 33 million access lines. SBC Communications, Inc., Form 10-K filed March 13, 1998, at p. 5. Ameritech has 20.5 million access lines. Ameritech Corp., Form 10-K filed March 13, 1998, at p. 2. Bell Atlantic and GTE combined will have 63 million access lines. "Bell Atlantic and GTE Agree to Merge," News Release, July 28, 1998, <http://www.gte.com/g/news/gtebell.html> (visited Oct. 9, 1998). As of July 1, 1997, the total number of access lines was 154.5 million (qualified USF loops of billed carriers contributing to the Universal Service Fund). Trends in Telephone Service, Common Carrier Bureau, Industry Analysis Division (Feb. 1998) at Table 8.2, pp.112-114 and n. a.

I. THE MERGER WILL BRING TO AMERITECH'S REGION A MANAGEMENT PHILOSOPHY THAT IS TOTALLY RESISTANT TO COMPETITION

A. SBC Has a Record in Texas of Committed Opposition to Market-Opening Measures.

In its proceeding to consider SBC's application for Section 271 authority, the Commissioners of the Texas Public Utility Commission took special note of SBC's "stonewall" tactics towards prospective local exchange competitors. The following comments from the Commissioners reflect a history of frustration in dealing with SBC:

Commissioner Walsh: The record is replete with examples of Southwestern Bell's failure to meaningfully negotiate, reluctance to implement the terms of the arbitrated agreements, lack of cooperation with customers and evidence of behavior which obstructs competitive entry.

Commissioner Curran: Here we have a situation where potential competitors have spent enormous time and effort and probably enormous sums of money attempting to gain a foothold in the local telephone market. The regulatory agency has spent untold hours in an effort to establish mechanisms under which the phone customers of Texas will have a choice in their local phone service, and this enormous effort has resulted in a movement of just 1 percent of phone customers to competitors. I don't believe the record supports the explanation that this is the result of a lack of interest, either on the part of consumers or on the part of potential competitors.

Currently, there are CLECs with de minimis customers, and even those de minimis customers have been secured only with tremendous efforts and with Bell resisting at every turn. Will these CLECs and other CLECs be able to retain even this level of customer base into the future, much less to provide a real competitive alternative to additional subscribers? Under current practice, it is highly doubtful.

Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, Project No. 16251, Tr. 187, 202, 203-204 (May 21, 1998). At the conclusion of the hearings on SWBT's draft 271 application, the PUC wisely observed that "SWBT needs to change its corporate attitude and view [its competitors] as wholesale customers. . . . SWBT needs to show this Commission and participants during the collaborative process by its actions that

its corporate attitude has changed and that it has begun to treat CLECs like its customers. . . ." *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*, Project No. 16251, Commission Recommendation, at 2. SWBT's treatment of its competitors in Texas reflects SBC's propensity for resisting competition at every stage. This treatment represents a management philosophy at SBC.

There can be no doubt that SBC is the dominant party in this merger, and its management philosophy will take over if SBC acquires Ameritech. Indeed, according to press reports, Ameritech's top five executives have golden parachutes that would allow them to leave the company post-merger with very attractive financial packages.² That was also the pattern followed at Pacific Bell, where SBC management took over after the merger, and -- as we describe below -- Pacific Bell's competitive practices worsened.³

B. SBC's Takeover of PacTel Has Resulted in A Deterioration of Service For Both Competitors and Consumers.

Since SBC acquired Pacific Bell in April 1997, the infiltration of the SBC corporate culture has had a negative impact on competition and consumer service in California. There is no reason to expect that things will be any different with its takeover of Ameritech.

For example, in its recent report on Pacific Bell's notice of intent to file for Section 271 authority in California, the Public Utilities Commission staff cited Pacific Bell for the misuse of

² Poling, "SBC, Ameritech Are Contrasts in Style," *The Orange County Register*; May 12, 1998, p. C3, 1998 WL 2627981; Keller, "Growing Up: SBC Communications To Acquire Ameritech In a \$55 Billion Deal," *The Wall Street Journal*, May 11, 1998, A1, 1998 WL-WSJ 3493498.

³ Poling, "SBC, Ameritech Are Contrasts In Style," *The Orange County Register*, May 12, 1998, C3, 1998 WL 2627981 (describing the bailout of top PacTel executives following the merger, assisted by golden parachutes).

customer proprietary network information ("CPNI") to maintain or win back customers that had chosen to switch carriers. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California*, at 26 (July 10, 1998). Only one month earlier, the Texas PUC had cited SWBT for the same infraction and had to direct SWBT not to use CPNI to win back customers lost to competitors. *Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market*, Project No. 16251, Commission Recommendation, at 3. Clearly, SBC's improper use of CPNI to counteract its competitors' sales efforts does not evidence an intent to open its markets to competition.

In addition, the California staff noted a number of deficiencies in Pacific Bell's provision (or more accurately, failure to provision) collocation space to its competitors, including Pacific Bell's denial of access to collocation in key central offices due to an alleged lack of space; failure to deliver collocation space on schedule; and ambiguous rules for the implementation of physical and virtual collocation that were subject to change unilaterally by Pacific Bell. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California*, at 37.

The California staff also found that as a condition of obtaining access to Pacific Bell's new OSS interfaces, CLECs were required to sign an OSS appendix that contained a number of unfavorable and questionable provisions. Among the offensive provisions were that CLECs would not be provided access to customer service records ("CSRs") until after the customer had agreed to switch carriers. This restriction clearly hampers the CLECs' ability to make effective sales proposals

to customers by denying them access to vital information. Pacific Bell also reserved the right to modify or discontinue use of any OSS interface upon 90 days' prior written notice, a reservation which obviously introduces tremendous financial and operational uncertainty for CLECs. Finally, the OSS appendix required the signatory to agree that Pacific Bell "provides nondiscriminatory access to its OSS interfaces." The Staff appropriately expressed concern that Pacific Bell's insistence on these conditions constituted an abuse of market power. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California*, at 29-30.

Issues relating to compliance with the requirements of Section 252(i) of the Act were also raised against SBC's affiliates in California. The California Commission staff expressed concerns about Pacific Bell's refusal to comply with its obligations under Section 252(i) of the Act by making the terms and conditions of an interconnection agreement entered into with one paging company available to other paging companies and directed Pacific Bell to supply the reasons for its noncompliance. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California*, at 41.

Since SBC's acquisition of Pacific Bell, numerous complaints have been filed relating to its business practices and customer service policies. In an Order Instituting Rulemaking released on June 18, 1998, the California Commission noted that formal and informal customer complaints about deteriorating telephone service had proliferated in the last year, prompting it to open an investigation on service quality standards. *Order Instituting Rulemaking on the Commission's Own Motion into*

the Service Quality Standards For All Telecommunications Carriers and Revisions to General Order 133-B, R.98-06-029 (Cal. PUC, June 18, 1998). SBC had assumed control of Pacific Bell just over a year before the release of the Commission's Order.

Pacific Bell's own employees recently filed a complaint with the California Commission alleging that SBC had implemented an aggressive, irresponsible and deceptive sales policy, emphasizing sales over service and customer satisfaction. *Telecommunications International Union, International Federation of Professional and Technical Engineers, AFL-CIO v. Pacific Bell and SBC*, filed June 18, 1998 with the California Public Utilities Commission.

The Utility Consumers Action Network ("UCAN"), a San Diego-based consumer watchdog group, has filed numerous complaints against Pacific Bell alleging that residential service has deteriorated significantly under Southwestern Bell's stewardship. Examples of service deteriorations cited by UCAN include Pacific Bell's closure of public offices, which has a disproportionate impact on low income and elderly customers who use the offices to pay bills, reinstate service or interact on a face to face basis with Pacific Bell employees;⁴ and Pacific Bell's allegedly deceptive and misleading marketing campaigns for Caller ID and related services.⁵

It would be a clear detriment to competition if SBC's campaign to make it difficult for competitors to exercise their rights of interconnect and network access were extended to Ameritech's region. Yet that is what may be expected if the merger is approved. Nothing could be more

⁴ UCAN March 23, 1998 Protest of Pacific Bell Advice Letters 19291 and 19294 –Office Closures.

⁵ *The Utility Consumers's Action Network v. Pacific Bell (U-1001-C)*, C. 98-04-004 (Cal. PUC, filed June 2, 1998).

detrimental to the Congressional goal of opening the telecommunications markets to competition and making available to consumers a choice of local telephone service providers.

II. THE CLAIMED PUBLIC BENEFIT OF THE MERGER IS NOT PLAUSIBLE.

SBC claims that the merger is necessary to enable it to pursue a national strategy of entering out-of-region local exchange markets. That claim is not plausible.

1. SBC is already a huge company. It does not need to become even more huge in order to compete. It already has approximately 33 million access lines. It serves the nation's two most populous states, California and Texas, as well as 7 of the country's 10 largest metropolitan areas and 16 of the country's 50 largest metropolitan areas.⁶ Its 1997 revenues were \$24.8 billion (\$26.8 billion if SNET's 1997 revenues are added), and its 1997 operating income was over \$3 billion.⁷ Its revenues and net income are already comparable to the companies it claims it must compete with: MCIWorldCom (\$27 billion/\$500 million); Sprint (\$15 billion/\$1 billion); Bell Atlantic (\$30 billion/\$2.5 billion); BellSouth (\$21 billion/\$3.3 billion); GTE (\$23 billion/\$2.8 billion); and France Telecom (\$27 billion/\$2.5 billion). SBC Brief at 53 n.67.

SBC points out that, without the merger, its revenues and income will lag behind AT&T/TCG ((\$51 billion/\$4.6 billion), and its revenues (but not its income) will lag behind Nippon Telephone (\$77 billion/\$2.4 billion) and Deutsche Telekom (\$39 billion/\$2 billion). *Id.* But the latter two companies lack the name recognition in the local market, as well as managerial and technical experience, both of which the Commission has recognized as essential for a company to

⁶ SBC Communications, Inc., Form 10-K filed March 3, 1998, "Business Operations."

⁷ SBC Communications, Inc., 1997 Annual Report at 31.

be a significant competitor in the local exchange market. *Bell Atlantic-NYNEX Merger Order*, ¶¶ 106, 107. And while AT&T has a recognized brand name and exceeds SBC in terms of revenues and income, AT&T has had these advantages since the passage of the Telecommunications Act of 1996 and has yet to make significant inroads in the local exchange market.

SBC says that its first realization of the need to become larger was the announcement of the MCI/WorldCom merger; at that point, SBC says, it realized that it had to compete with companies of that size for the business of its large corporate customers, both within and without its region. *Kahan Aff.* ¶ 10. But SBC has already achieved the size of MCIWorldCom; its revenues are at about the same level as MCIWorldCom's, and its net income is higher. Moreover, it has far more managerial and technical experience in local exchange markets. In terms of financial and managerial resources, there is no reason why SBC cannot start competing with MCIWorldCom (and other companies of similar size) without any further mergers.

Contrary to SBC's claims, it is not at all clear that huge size is a necessary prerequisite of entry into the local exchange market. As SBC's economic expert Professor Carlton points out, there are "a significant number of potential entrants into the provision of local service." *Carlton Aff.* ¶ 37. Most of the potential entrants Prof. Carlton lists are far smaller than the present SBC – let alone the proposed SBC/Ameritech. *Carlton Aff.* ¶ 36. Yet, as Prof. Carlton notes, these entrants in general are "credible, well financed, and often led by experienced and highly successful managers." *Carlton Aff.* ¶ 37.

Prof. Carlton points out that "large established telecommunications companies have no special advantage in entering into the provision of competitive local exchange service." *Carlton Aff.* ¶ 39. In particular, Prof. Carlton notes, "during time of rapidly changing technology . . . smaller

firms may be able to respond . . . more quickly than established ones." *Id.* SBC's other experts agree, stating that "SBC and Ameritech are disadvantaged with respect to entry compared with other telecommunications suppliers that already possess facilities, customers and brand name recognition in the markets to be entered." Schmalensee and Taylor Aff. ¶ 6.

In the market for small and medium-sized business and residential customers, brand-name recognition is crucial, and the merger will not give SBC significant out-of-region brand-name recognition. In addition, to reach these customers, SBC admits that its own facilities will have to be supplemented by "extensive utilization of unbundled network elements, primarily local loops." Kahan Aff't ¶ 39. The massive size of the post-merger SBC will not help to overcome the obstacles smaller CLECs have encountered in this area. Indeed, if the incumbent LEC regards SBC as a more serious potential competitor than smaller CLECs, it will have an increased incentive to raise obstacles in the path of its utilization of unbundled network elements.

In short, SBC is already large enough. There is no guarantee that getting larger will enhance its ability to compete – indeed, it may only add to the disadvantage that large size already gives it.

2. Moreover, increasing the size of the remaining Bell companies might well discourage any further competition between them. As previously described, the combined SBC/Ameritech will control one-third of the access lines in the country, including most of the country's largest metropolitan areas. SBC admits that any competitive foray into the territory of Bell Atlantic/NYNEX/GTE or other ILECs will elicit a retaliatory competitive response. SBC Brief at 24-25. In those market segments where SBC does not presently face substantial competition (i.e., residential and small and medium-sized businesses), it has no particular reason to initiate the process of supplying competitive local service – a process the incumbent ILEC can make difficult and

expensive – if the result will be to induce retaliation from the other Bell behemoth, resulting in a large expense for both parties and no net gain.

SBC admits that the primary focus of its strategy is not to open markets that are presently uncompetitive and invite retaliation, but rather to target the large business customers who already have several other firms competing to provide them service. SBC says that the primary focus of its strategy is "the thousand largest companies in the United States," particularly those with principal offices within SBC's region which are already taking service from SBC. Kahan Aff't ¶ 30. "The core of the National-Local Strategy is the conclusion that SBC must develop the capability to compete for the business of large national and global customers both in-region and out-of-region." Kahan Aff't ¶ 13.

But the market for larger business customers, while still dominated by incumbent LECs, is the segment of the local exchange market that is in the least need of additional competitors. As the Commission has found, "there are a large number of firms that actually compete or have the potential to compete in this market." *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Dkt. No. 97-211, Memorandum Opinion and Order (rel. Sep. 14, 1998), ¶ 173. The public benefit of an additional competitor in a segment of the market that is already becoming competitive is not such as to justify the anticompetitive effects of this merger.

3. Moreover, SBC presents a powerful argument for why it will have to compete for the local business of its largest customers outside its region, whether or not it merges with Ameritech. SBC argues that in today's more competitive environment, if it and Ameritech do not follow their current large business customers to out-of-region locations, other competitors will take their in-

region business from these customers. Kahan Aff. ¶ 10. These customers represent the "profitable core" of SBC's business. SBC Brief at 49. With competitive carriers such as MCIWorldCom attacking its high-end corporate business, SBC says it concluded that a strategy confined to its own region was "no longer viable for SBC." Kahan Aff. ¶ 22. As SBC explains, "[w]e cannot remain idle while our competitors capture the huge traffic volumes generated by a relatively small number of larger customers." Kahan Aff. ¶ 13. Rather than lose its large business customers to "financially strong, technically capable, fully integrated national and global competitors," SBC states that it has decided to become one of those competitors. Kahan Aff. ¶ 23.

But if that is true, SBC will have to counterattack by competing out-of-region for large business customers regardless of whether it merges. And since it is already as large as the competitors which, it says, may take away its largest customers, there is no reason why SBC, without the merger, cannot effectively mount a competitive response.

III. THE MERGER WILL ELIMINATE SIGNIFICANT POTENTIAL COMPETITION BETWEEN SBC AND AMERITECH.

It is conceded that, before the merger was announced, Ameritech entered the St. Louis market as a CLEC, offering resold local service to its existing cellular customers. The merger will eliminate Ameritech as a competitor with SBC in the St. Louis area.

SBC argues that Ameritech was not a significant competitor in St. Louis, because its effort was designed only to protect its cellular business against erosion by wireless competitors offering bundled wireless and local exchange service. SBC Brief at 70-72.

However, Ameritech had a more expansive view when it initially announced its market entry in St. Louis. It stated that "St. Louis is one of the nation's great markets, and this expansion

represents a tremendous opportunity for Ameritech to grow through competition." The company was optimistic about its prospects in St. Louis, explaining that "[t]he Ameritech brand is already strong there, as evidenced by our superior customer growth in cellular and paging."⁸

Since Ameritech has already entered the St. Louis market, it is doubtful whether it is necessary to apply the tests of the potential competition doctrine to conclude that elimination of Ameritech from that market harms competition. Nevertheless, application of that doctrine confirms that elimination of Ameritech from the St. Louis market is anticompetitive. The five elements of the potential competition doctrine, as summarized in the *Bell Atlantic/NYNEX Merger Order*, ¶ 138, are fulfilled by Ameritech's entry into the local exchange market in St. Louis:

1. The local exchange market in St. Louis is "highly concentrated" (as required by the first element). *Id.* No one disputes that fact.

2. The second element requires that "few other potential entrants are 'equivalent' to the company that proposes to enter the target market by merger." *Id.* SBC argues that there are two other significant competitors in St. Louis: AT&T/TCG/TCI and MCI/WorldCom. SBC Brief at 72.

Even if that were true, the potential competition doctrine would still be applicable. In the *Bell Atlantic/NYNEX Merger Order*, the Commission found that the merger would have anticompetitive effects because it would eliminate "one of just four new significant market

⁸ "Ameritech to Expand in St. Louis," Ameritech Press Release (Nov. 6, 1997). [Http://www.ameritech.com/media/releases/release-1254.html](http://www.ameritech.com/media/releases/release-1254.html) (visited September 1, 1998). Ameritech also described its plans in its 10-K filed March 13, 1998: "Now that we have approval from the Missouri public service commission, we plan to offer local and long distance phone service to residential customers in the St. Louis metropolitan area in early 1998. . . . Our offerings in the St. Louis market will include local phone, long distance, cellular, paging and wireless data services. Customers will have the option of a consolidated bill." Ameritech Corp., Form 10-K, Item 1 "Business," "Landline Communications Services."

participants." *Id.* at ¶ 108. Moreover, Ameritech appears to be "the 'second choice' alternative for a significant number of customers," *id.*, since it has a large customer base and is one of the top two telecommunications brand names in the market, along with AT&T. Ameritech has 250,000 to 300,000 wireless subscribers in the St. Louis metropolitan area, or about 10% of the overall population of 2.5 million.⁹ The President of Ameritech Cellular predicted that "the majority of our base of customers will come over to this product."¹⁰ Ameritech research is reported to have shown that Ameritech is one of the "top two" telecommunications brand names in St. Louis, along with AT&T.¹¹

3. The third element requires that "the company entering the target market by merger was reasonably likely to have entered the market but for the proposed merger." *Id.* Ameritech was not "reasonably likely" to enter the market but for the merger; it did enter the market before the merger. And while it now says that the entry was "limited," its initial statements upon entering the market, as well as its high brand-name recognition and large base of existing customers, tell a different story.

4. The fourth element requires that the company seeking to enter the market through merger "had other feasible means of entry." *Id.* Ameritech obviously thought it had "other feasible means of entry," since it actually did enter the market through means other than merger. And while it now denigrates its prospects in that market, the Commission is not bound by "subjective statements of company officials" concerning their entry plans, particularly when those statements

⁹ "Spirit of St. Louis Haunts SBC-Ameritech Merger Plan," 6/8/98 Wall Street Journal B4.

¹⁰ *Id.*

¹¹ *Id.*

are contradicted by actions the company took before the merger was announced. *Bell Atlantic/NYNEX Order*, ¶ 75 and note 166, quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring).

5. The final element requires that the alternative means of entry "offer a substantial likelihood of ultimately producing de-concentration in the target market or other significant pro-competitive effects." *Bell Atlantic/NYNEX Merger Order*, ¶ 138. SBC now minimizes Ameritech's chances of success. But Ameritech thought its prospects were good when it entered, based on its significant existing customer base and its high brand-name recognition. In addition, Ameritech possesses the managerial experience and technical expertise which the Commission has deemed important in assessing the significance of potential competition in the local exchange market. *Id.*, ¶ 107. SBC's self-serving pessimistic assessment, concerning a project that was only put on hold after the merger was announced, is not credible.

IV. THERE MUST BE INSPECTION OF HART-SCOTT-RODINO DOCUMENTS AND A HEARING WITH RESPECT TO OTHER AREAS OF POTENTIAL COMPETITION BETWEEN SBC AND AMERITECH.

Ameritech's forays into SBC territory were not limited to St. Louis. Ameritech's CLEC subsidiary is already certificated in California and Texas, with interconnection agreements signed in both jurisdictions. By obtaining certification and interconnection arrangements, Ameritech traveled farther on the road to competitive entry in California and Texas than Bell Atlantic was in New York prior to the merger with NYNEX. Yet the Commission concluded in the *Bell Atlantic/NYNEX Merger Order* that Bell Atlantic was a "precluded competitor and among the most significant market participants" in the New York local exchange, exchange access, and long distance

markets.¹² The Commission should closely review *all of* Ameritech's competitive activities in assessing where it may have been an actual potential competitor of SBC.

In considering whether two companies may have been actual potential competitors of one another, the Commission is not "bound by subjective statements of company officials that they have no intention of making a de novo entry. . . . [T]he decision whether the acquiring firm is an actual potential competitor is, in the last analysis, an independent one to be made by the trial court [or the FCC in this case] on the basis of all relevant evidence properly weighed according to its credibility."¹³ Thus, as in the Bell Atlantic/NYNEX merger context, the Commission should review – and allow interested parties to review – the Hart-Scott-Rodino documents that SBC and Ameritech have filed with the Department of Justice.¹⁴ Such documents could prove essential in further understanding the internal workings of the companies at the time they made the decisions to either compete or not compete in each other's markets.¹⁵ It would be particularly helpful to know whether the prospect of a potential merger entered into the decision making process.

¹² *Bell Atlantic/NYNEX Merger Order*, at ¶ 73.

¹³ *Id.*, at ¶ 75, n. 166 (quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring)).

¹⁴ See *BA/NYNEX Merger Order*, at ¶ 28 (referencing Nov. 22, 1996 letter from the Common Carrier Bureau requiring Bell Atlantic and NYNEX to make approximately 30,000 of the Hart-Scott-Rodino documents available for review pursuant to protective order).

¹⁵ As the Commission noted in its *BA/NYNEX Merger Order*, the Fifth Circuit has previously found that it was within the Federal Reserve Board's discretion to afford little weight to "the self-serving statements proffered to demonstrate the merger applicant would not enter the relevant market independently." *BA/NYNEX Merger Order*, at ¶ 75, n. 166 (citing *Mercantile Texas Corp. v. Federal Reserve Board*, 638 F.2d 1255, 1268-70 (5th Cir. 1981)).

V. IF THE COMMISSION APPROVES THE MERGER, APPROVAL SHOULD BE CONTINGENT UPON STRINGENT, PRO-COMPETITIVE CONDITIONS.

It is doubtful whether conditioning the merger can alleviate its anticompetitive effects. Conditions could not prevent the manifold pernicious effects of a "stonewall" corporate management philosophy, once it has taken over Ameritech's region. Conditions could not restore the competition between Ameritech and SBC in the St. Louis market that the merger will eliminate. Nor can conditions make it likely that two behemoth Bells will compete in each other's region when it is more profitable for them to arrive at a tacit mutual non-aggression pact. And even if conditions could alleviate all these competitive harms, they would do so only if enforced. But as a practical matter, the merger once consummated cannot be undone; and it is unlikely that any other sanctions will be sufficient to produce compliance.

If the Commission approves this merger despite the severe competitive concerns and the lack of a convincing public benefit, it should consider the Bell Atlantic/NYNEX merger conditions as no more than a floor for guarding against competitive harms.

In addition to those conditions, the Commission should require to the new SBC-Ameritech to commit to providing greater discounts on resold services and prices for unbundled network elements that truly comply with the methodology set forth in the *Local Competition Order*.

In addition, the Commission should require the new SBC-Ameritech, if it applies for in-region interLATA authority following the merger, to demonstrate that effective competition (as that term may be embodied in the competitive checklist) exists *throughout its entire region*, rather than looking at any one state. Such a condition would provide much-needed safeguards against an abuse

of market power by this new local exchange service giant, and furnish the additional incentives necessary to induce the combined company to take steps in opening all of its markets to competition.

The Commission should also require the new SBC-Ameritech to provide technically feasible combinations of network elements at forward-looking cost-based rates. The widespread RBOC intransigence in providing network element combinations has no basis in technology or in economics, and is merely a roadblock the RBOCs have created out of legal fiction to limit competitive entry. As a step toward ensuring that the market is open to competitors, the SBC-Ameritech behemoth should commit to eliminate this patently arbitrary and discriminatory prohibition on combinations throughout its combined region.

The Commission should also require SBC-Ameritech to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the Bell Atlantic-NYNEX merger.¹⁶ Since the new SBC-Ameritech would already be compiling data on a monthly basis under the basic Bell Atlantic-NYNEX conditions, it should not be too much of an additional burden to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent – especially one like the proposed SBC-Ameritech company, which would have a monopolistic level of market share and bottleneck control of essential facilities across such a large span of the nation.

More stringent reporting requirements, however, are only a means to an end. Reports allow carriers to measure performance, but they cannot prevent SBC-Ameritech from acting in a

¹⁶ See *Bell Atlantic/NYNEX Merger Order*, at App. C.1.d.

discriminatory and anticompetitive manner. The Commission should attach conditions compelling the combined SBC-Ameritech to adhere to certain levels of performance in providing competitors with access to unbundled network elements and resold services. For each reporting category imposed, SBC-Ameritech should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when the mega-ILEC is performing in a substandard manner.

While we recognize that the Commission tentatively concluded in its Operations Support Systems rulemaking that it would be "premature" to develop performance standards,¹⁷ it would only be through the adoption of such standards that the reporting requirements can truly provide competitors with certainty in analyzing the relative performance of SBC-Ameritech. Where the Commission feels that there is insufficient information to develop reasoned performance standards for a particular reporting category, the Commission should require the combined SBC-Ameritech to clearly identify the performance levels and intervals it would provide for itself, and adopt those as default performance standards.¹⁸

The Commission should also ensure that the combined SBC-Ameritech cannot evade compliance with these merger conditions. It will be practically impossible, of course, to undo the merger once it has been completed, although that might be the only effective sanction. Instead, the

¹⁷ *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

¹⁸ The Commission should also require periodic independent third-party verification of SBC-Ameritech's OSS to better ensure that performance will be satisfactory going forward.

Commission should establish a system of reasonable yet strict financial sanctions for failure to adhere to the performance standards incorporated in the merger conditions.

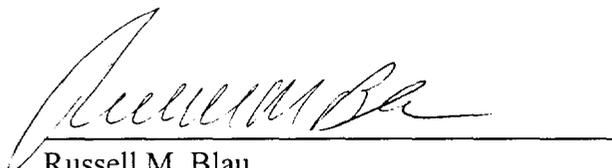
For example, if SBC-Ameritech's performance vis-a-vis a CLEC in any category in which it is required to report falls below the level of performance it provides for its own operations for two consecutive months, the Commission should assess a fine of \$75,000 for each month thereafter that the substandard performance in that category continues. The proposed amount of this fine has a sound basis. In the Southwestern Bell-AT&T interconnection agreement in Texas, Southwestern Bell has already agreed to pay liquidated damages of between \$25,000 and \$75,000 in cases where Southwestern Bell's performance falls below a certain measurement level for two consecutive months.¹⁹ Adopting a performance penalty on the high end of that range in the present context would help ensure that there are adequate disincentives to deter the larger, richer, more powerful combined SBC/Ameritech from engaging in anticompetitive conduct.

¹⁹ Interconnection Agreement-Texas between Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc., Atch. 17, section 1.1.4.3.

CONCLUSION

The application for a transfer of control should be denied.

Respectfully submitted,



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October 15, 1998

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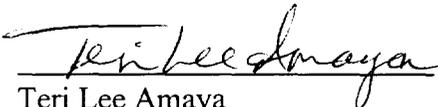
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